

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
The Helicon Group, L.P. d/b/a)	
Charter Communications)	CSR-5801-E
)	
Petition for Determination of Effective)	
Competition in Barnet, Vermont (VT0212), <i>et al.</i>)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 5, 2002

Released: September 6, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. The Helicon Group, L.P. d/b/a Charter Communications ("Charter") has filed with the Commission a petition pursuant to Section 76.7 of the Commission's rules for a determination of effective competition with respect to certain communities in Vermont (collectively, the "CPG").¹ Charter alleges that its cable system serving the CPG is subject to effective competition pursuant to Section 623(a) of the Communications Act of 1934, as amended ("Communications Act"), and Section 76.905(b)(2) of the Commission's rules, and seeks revocation of the certification of the Vermont Public Service Board to regulate basic service rates.² Charter claims the presence of effective competition in the CPG stems from the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. and EchoStar Communications Corporation ("EchoStar"). No opposition to the petition was filed.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be

¹ 47 C.F.R. § 76.7. In Vermont, the Public Service Board issues Certificates of Public Good authorizing cable operators to provide cable service to certain areas within the state. Charter seeks a finding of effective competition for its cable system operating under a Certificate of Public Good issued in Docket 5674 which encompasses the City of Barre, the Villages of Lyndonville and Wells River, and the Towns of Barnet, Barre, Berlin, Burke, Concord, Danville, Groton, Kirby, Lyndon, Newbury, Orange, Peacham, Ryegate, St. Johnsbury, Sheffield, Sutton, Washington, Waterford, Wheelock, and Williamstown. Petition at 1. For purposes of establishing effective competition in the instant proceeding, Charter's franchise area is the CPG. The FCC Community Unit Identifications associated with the CPG are listed in Attachment A hereto.

² 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

subject to effective competition,³ as that term is defined by Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. Based on the record in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds fifteen percent (15%) of the households in the franchise area.⁵

4. Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁶ Charter has provided evidence of the advertising of DBS service in news media serving the CPG.⁷ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.⁸ Charter has demonstrated that the CPG is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the CPG, that there exists no regulatory, technical, or other impediments to households within the CPG taking the services of the DBS providers, and that potential subscribers in the CPG have been made reasonably aware of the MVPD services of DirecTV and EchoStar.⁹ Therefore, the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter sought to determine the competing provider penetration in its franchise area by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in the CPG on a five-digit zip code basis.¹⁰ However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may actually live in zip codes outside of

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

⁵ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁶ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ Petition at 4 and Exhibit 1.

⁸ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4-5 and Exhibit 2. Exhibit 2 includes the channel line-up for Charter's cable system serving the CPG and the nationwide channel lineup of DirecTV. While Charter did not provide in its Petition a copy of EchoStar's nationwide channel lineup, which is otherwise available at www.dishnetwork.com, we have consistently found that the programming of both DBS providers satisfies the programming compatibility component of the competing provider effective competition test. *See, e.g., Mountain Cable Company*, 14 Fcc Rcd 13994, 14001 (1999).

⁹ Petition at 3-5.

¹⁰ *Id.* at 5-6.

the CPG.¹¹ To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the CPG and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹² Charter also reduces the estimated DBS subscriber count by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.¹³ The Commission believes that Charter's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

6. Charter asserts that it is the largest MVPD in the CPG because Charter's subscribership exceeds the aggregate DBS subscribership for the communities.¹⁴ Based upon the DBS provider's aggregate 26.1 percent subscriber penetration level, calculated using 2000 Census household data,¹⁵ we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the CPG. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving the CPG is subject to effective competition.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by The Helicon Group, L.P. d/b/a Charter Communications **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification of the Vermont Public Service Broad to regulate basic cable service in the City of Barre, the Villages of Lyndonville and Wells River, and the Towns of Barnet, Barre, Berlin, Burke, Concord, Danville, Groton, Kirby, Lyndon, Newbury, Orange, Peacham, Ryegate, St. Johnsbury, Sheffield, Sutton, Washington, Waterford, Wheelock, and Williamstown, Vermont **IS REVOKED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹¹ *Id.* at 6.

¹² *Id.* at 6-7 and Exhibits 4-5.

¹³ *Id.* at 7. According to documentation previously provided to the Commission, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." *See Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002).

¹⁴ Petition at 6 and Exhibit 3.

¹⁵ *See id.* at Exhibit 4 (5,788 DBS subscribers ÷ 22,206 CPG 2000 Census households = 26.1%).

¹⁶ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5801-E

<u>Community</u>	<u>CUID No.</u>
Barnet, Town	VT0050
	VT0212
Barre, City	VT0055
Barre, Town	VT0107
Berlin, Town	VT0151
Burke, Town	VT0213
Concord, Town	VT0048
Danville, Town	VT0179
Groton, Town	VT0215
Kirby, Town	VT0201
Lyndon, Town	VT0199
Lyndonville, Village	VT0049
Newbury, Town	VT0130
Orange, Town	VT0197
Peacham, Town	VT0216
Ryegate, Town	VT0217
Sheffield, Town	VT0218
St. Johnsbury, Town	VT0198
Sutton, Town	VT0220
Washington, Town	VT0196
Waterford, Town	VT0083
	VT0085
Wells River, Village	VT0017
Wheelock, Town	VT0221
Williamstown, Town	VT0108